2023 INSC 1093

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5094 OF 2011

DEREK A C LOBO & ORS.
...APPELLANT(S)
Vs.

ULRIC M A LOBO(DEAD) BY LRS. & ORS.
...RESPONDENT(S)

J U D G M E N T

C.T. RAVIKUMAR, J.

1. This appeal is filed against the judgment and order dated 21.11.2008 passed by the High Court of Karnataka at Bangalore in M.F.A. No.3077 of 2001 reversing the judgment and decree dated 20.02.2001 passed by the III Additional District Judge, Dakshina Kannada at Mangalore in O.S. No.21 of 1997.

2. The suit in question was originally filed as a petition for probate of the Will dated 10.11.1992,

executed by deceased Cecelia Lobo, by her sons Dr. Derek AC Lobo and Cedric P.A. Lobo who are the joint executors named therein. In the said proceedings the original defendants 1 and 6, who are the daughters of deceased Cecelia Lobo, put in caveat and disputed its execution and genuineness. Subsequently, it was converted as an original suit under Section 295 of the Indian Succession Act and was numbered as O.S. No.21/1997. Evidently, the 5th defendant who was another brother of the appellants resisted the suit by filing a written statement and the sisters of the appellants herein who are respondent Nos. 3 and 7 herein (defendant Nos. 1 and 6 in the suit), jointly filed a written statement. On the side of the plaintiffs, the first plaintiff got himself examined as PW-1, defendant No.7 was examined as PW-2 and one of the attesting witnesses was examined as PW-3. On the side of the defendants, defendant

No.5 was examined as DW-1, one Jathin C. Patna was examined as DW-2 and a finger print and hand writing expert by name C.V. Jayadevi was examined as DW-3. After appreciating the oral and documentary evidence, the trial Court decreed the suit and held that the plaintiffs are entitled to the grant of probate of the last Will and testament dated 10.11.1992 of their deceased mother Cecilia Gertrude Lobo. Further consequential directions were also issued as per the judgment dated 20.02.2001.

3. Aggrieved by the judgment and decree of the trial Court, defendant No.5 preferred appeal viz., M.F.A. No.3077 of 2021, which ultimately culminated in the impugned judgment. None of the other defendants filed any appeal against it. After re-appreciation of the evidence the High Court held that the Will dated 10.11.1992 is shrouded with suspicious circumstances and

reversed the judgment and decree of the trial Court. As a necessary sequel the suit was dismissed.

4. As per the order dated 09.07.2009, this Court ordered the parties to maintain the status quo, as it existed on that date, until further orders.

5. Heard Mr. Nikhil Nayyar, the learned senior counsel for the appellants and Mr. Devashish Bharuka, the learned counsel for respondent Nos. 2 and 3 who were defendant Nos. 1 and 6. None of the other respondents including the legal representatives of deceased defendant Nos. 3 and 5 have chosen to contest the matter despite the receipt of notice.

6. A bare perusal of the judgment and decree of the trial Court as well as the impugned order would reveal that with respect to the issue of execution of the Will dated 10.11.1992 by deceased Cecelia Gertrude Lobo the courts are *ad*

idem, in the sense that it was she who had signed the same as testatrix. The trial Court held that the plaintiffs had succeeded in proving the execution of the Will in terms of the provisions under Section 63 of the Indian Succession Act, 1925 (for brevity, 'the Succession Act') and Section 68 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act'). However, even after finding that the Will was executed by Mrs. Cecilia Gertrude Lobo the High Court reversed the judgment of the trial Court holding that in view of the suspicious circumstances it could not have been held that the plaintiffs had succeeded in proving due and valid execution of the Will. In troth, High Court did not specifically enter into any specific finding regarding the mental condition of the testatrix for executing the Will in question. The impugned order would reveal that after elaborately considering the physical state of the testatrix that

she was suffering from arthritis and was in considerable pain the High Court held that there was nothing on record to show that she had executed it after understanding its contents. We will dilate on this point a little later. The suspicious circumstances enumerated by the High Court are as under:

(i) *Failure to prove that the testatrix executed the Will after understanding its contents;*

(ii) *The prominent-participation of the beneficiaries of the Will in getting the Will executed;*

(iii) *No reason is forthcoming, virtually not discernible, from the Will as to why some of the children were dis-inherited by the testatrix;*

(iv) *Non-examination of the material witnesses including the advocate who prepared the draft Will and;*

(v) *Sale of some of the properties by the plaintiffs after the death of the testatrix, but before the grant of probate of the Will.*

7. It was assigning such reasons and taking them as suspicious circumstances surrounding the subject Will that the High Court reversed the judgment and decree of the trial Court holding that the trial Court went wrong in finding that the plaintiffs had succeeded in proving due and valid execution of the Will dated 10.11.1992.

8. It is well-nigh settled position that the burden to prove the execution of the Will is on the propounder(s) and on its discharge the onus would be on the opposing contestant to establish that it is not valid. Certainly, if suspicious circumstances have been pleaded by the contestant opposing Will and *prima facie* shown them to be true, then the onus would be shifted to the propounder(s) to dispel the suspicious circumstances to the satisfaction of the court so as to accept it as genuine. In the light of the position so settled and in view of the fact that the trial Court

and the High Court are at issue on the question whether the Will in question was proved as valid, in accordance with law, we will have to proceed to consider the said question. In that regard, in view of the undisputed position that the Will was executed by Cecelia Gertrude Lobo, the question to be considered is whether the circumstances taken as suspicious circumstances by the High Court are in troth, suspicious circumstances, capable of calling the propounder to dispel them.

9. For a proper consideration of the case on hand it is apposite to refer to the decision of this Court in ***"Moturu Nalini Kanth v. Gainedi Kaliprasad (Dead, Through Lrs.)***[1]*"* rendered after referring to and relying on various previous authorities on the legal requirements to prove a Will. This Court had elaborately considered the essential legal requirements to prove a Will and

[1] 2023 SCC Online SC 1488

ultimately held that mere registration of a Will would not attach to it a stamp of validity and it must still be proved in terms of the legal mandates under the said provisions of Section 63 of the Succession Act and Section 68 of the Evidence Act.

10. Section 63 of the Succession Act prescribes the mode and method of proving a Will and going by the provisions under Section 68 of the Evidence Act, though a Will shall not be used as evidence until one of the attesting witnesses has been examined. It will suffice to examine one of the attesting witnesses to prove the same. We may hasten to add and emphasize here that well-founded suspicious circumstance(s) if made out by any contestant opposing the Will concerned will shift the onus on the propounder to dispel such circumstance(s) to the satisfaction of the Court. In the case on hand, there is no dispute with respect to the fact that one of the attesting witnesses,

namely, Gregory Paris was examined and as such, there can be no case that the mandate under Section 68 of the Evidence Act was not complied with. There can also be no dispute that the witness had signed the Will in the presence of the testatrix after she had executed the same, going by the evidence on record.

11. Evidently, the trial Court had taken into account the entire evidence on record to conclude that legal requirements in terms of the provisions under Section 63 of the Succession Act and under Section 68 of the Evidence Act have been complied with by the plaintiffs and ultimately to hold that the plaintiffs have succeeded in proving the execution of the Will.

12. On the question of execution of the Will dated 10.11.1992, paragraph 21 of the impugned order itself would reveal that the High Court after appreciating the pleadings as also the oral

evidence including that of PW-1 and PW-2, and the documentary evidence observed and found that defendant Nos.1 to 4 and 6 had decided not to contest execution of the Will and further that it was only defendant No.5 (the appellant therein) who had contested the execution of the Will, while considering the question whether acknowledgment given by defendant No.1 and others as also the letters written by defendant No.1 would help in proving the due and valid execution of the Will. The relevant recital in that regard in paragraph 21 of the impugned judgment reads thus:

> *"21. ..... It is clear from the evidence of PW.2 as also PW.1 that the defendants 1 to 4 and 6 have decided not to contest execution of the will and they were supporting the plaintiffs and it was only defendant No.5 who has contested execution of the will and therefore, any letter written by the said parties who are not contesting the case and supporting the plaintiff*

would not in any way be helpful to the plaintiffs and therefore, the conduct of the plaintiff and defendants 1 to 4, 6 and 7 has to be considered in that behalf and much importance could not be attached to the documents which have come into existence at the instance of defendants who are supporting the plaintiffs....."

13. In view of the indisputable position thus obtained and that despite the grant of probate by the trial Court the 5th defendant alone had chosen to file appeal against the judgment and decree of the trial Court and further that defendant No.5 is no more, only the legal representatives of the deceased defendant No.5 can be permitted to contest on the execution of the Will. But then, it is a fact that the legal representatives of deceased defendant Nos.3 and 5 have not chosen to contest the matter in the present proceedings despite being served. Above all, it is an indisputable fact that the 5th defendant had earlier attempted to

bring in a case by way of amendment (though ultimately failed to prove) that the Will in question dated 10.11.1992 was subsequently revoked by the testatrix on 20.11.1992 as per Ext.D5. Two aspects turn out of it. Firstly, his admission to the fact that the subject Will dated 10.11.1992 was actually executed by the testatrix and she was fully aware of its contents. We may hasten to add that though the 5th defendant had produced Ext.D5 on 08.06.1999, both the trial Court and the High Court returned findings against the 5th defendant.

14. Now, going by the evidence on record, the testatrix was admitted in Jaslok Hospital, Bombay on 11.11.1992 only for knee replacement surgery to alleviate the affliction due to arthritis. Evidence on record would reveal that the testatrix underwent blood transfusion for three days, that thereafter underwent surgery and her condition became critical and that she remained in the said

hospital for 53 days till her death on 08.01.1993. Despite such position if the 5th defendant takes a stand that she was in a sound disposition of mind on 20.11.1992 to execute Ext.D5, how would he be justified in raising a case that the testatrix was not in a sound disposition of mind prior to her hospitalization in Jaslok Hospital, Bombay i.e., on 10.11.1992. In view of his case attempted to be brought in through Ext.D5 the 5th respondent could not have raised the contention that the testatrix was not in sound disposition of mind. This is the second aspect turning out of Ext.D5. We adverted to the aforesaid aspects revealed from evidence solely to show the hollowness of the case of the 5th defendant that Ext.P2 – Will dated 10.11.1992 was not executed with sound disposition. Anyway, the legal representatives of deceased defendant No.5 who alone disputed the execution of Ext.P2 Will, are not contesting the matter. The upshot of the

discussion is that the contesting respondent Nos.2 and 3 viz., defendant Nos.1 and 6 in the suit cannot be permitted to dispute the execution of the Will dated 10.11.1992 and that they can be permitted to urge only for sustaining the impugned judgment.

15. Now, we will refer to the cited suspicious circumstances. In the light of the decision in ***Gurdial Kaur & Ors. v. Kartar Kaur & Ors.***[2] there can be no doubt with respect to the position that when suspicious circumstances exist about the valid execution of a Will, it is the duty of the person seeking declaration about the validity of the Will to dispel such suspicious circumstances. In this context, we think it not inappropriate to refer to a decision of the High Court of Madhya Pradesh, in ***Nathia Bai and Ors. v. Gangaram and Ors.***[3], with which we agree, rendered relying on the decisions of this Court in ***Meenakshiammal***

[2] (1998) 4 SCC 384
[3] (2010) 1 MPLJ 140

(Dead) through Lrs. And others v. Chandrasekharan and Another[4] and in ***P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar***[5], that a party challenging the execution of a Will as suspicious must plead the suspicious circumstances and then only the propounder would legally be bound to remove these suspicious circumstances.

In ***Nathia Bai's*** **case** it was held thus:-

> *"11. The Will is required to be proved just like any other document by adducing the additional evidence to prove the ingredients as envisaged under Section 63(c) of the Succession Act by examining the attesting witness according to Section 68 of the Evidence Act. It is also well settled that the propounder of the Will is required to prove the Will by removing all suspicious circumstances. Thus, if suspicious circumstances would have been pleaded by the defendants, then only the plaintiffs, who*

[4] (2005) 1 SCC 280
[5] AIR 1995 SC 1852

are the propounder of the Will, were legally bound to remove those suspicious circumstances. The contestant opposing the Will, according to me, was required to bring the material on record so that the Will can be said to be a suspicious document and in that event the onus would shift back on the propounder of the Will to satisfy the Court by adducing positive evidence that the Will is not suspicious.....

(Underline Supplied)

In the decision in ***Meenakshiammal's*** **case** (supra), it was held in paragraphs 19 and 20 thus:-

"19. In the case of Chinmoyee Saha v. Debendra Lal Saha[6] it has been held that if the propounder takes a prominent part in the execution of the will, which confers a substantial benefit on him, the propounder is required to remove the doubts by clear and satisfactory evidence. Once the propounder proves that the will was signed by the testator, that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the disposition and put his

[6] AIR 1958 Cal 349

signature out of his own free will, and that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder, is discharged and when allegation of undue influence, fraud or coercion is made by the caveator, the onus is on the caveator to prove the same.

20. In the case of Ryali Kameswara Rao v. Bendapudi Suryaprakasarao[7] *this Court while discussing the provisions of Section 63 of the Succession Act, 1925, has held that the suspicion alleged must be one inherent in the transaction itself and not the doubt that may arise from conflict of testimony which becomes apparent on an investigation of the transaction. That suspicious circumstances cannot be defined precisely. They cannot be enumerated exhaustively. They must depend upon the facts of each case. When a question arises as to whether a will is genuine or forged, normally the fact that nothing can be said against the reasonable nature of its provisions will be a strong and material element in favour of the probabilities of the will. Whether a will has been executed by the testator in a sound*

[7] AIR 1962 AP 178

and disposing state of mind is purely a question of fact, which will have to be decided in each case on the circumstances disclosed and the nature and quality of the evidence adduced. When the will is alleged to have been executed under undue influence, the onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough.

(Underline supplied)

The decision in ***Madhukar D. Shende v. Tarabai Aba Shedage***[8], in so far as it is relevant, reads thus:

"8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any

[8] (2002) 2 SCC 85

prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on week foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in R. v. Hodge may be apposite to some extent:

> *'The mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.'*

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural

circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict – positive or negative.

9. It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or

being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

(Underline supplied)

In the decision in ***P.P.K. Gopalan Nambiar's*** case (supra), this Court held in paragraph 4 thus:-

"4. On appeal, the sub-ordinate Judge has given various reasons to accept the validity of the will. One of the reasons is that it is a registered will and the endorsement by the Registrar would show that the testator was in a sound disposing state of mind and that it was executed out of her free will and that, therefore, the discrepancy in the evidence of

DW 2, an attestor does not vitiate the validity of the will. On appeal, the learned Single Judge without going into the evidence, has stated in one sentence that he agrees with the reasoning of the trial court and does not agree with the reasoning of the appellate court. We are at a loss to appreciate the view taken by the learned Judge. The High Court also stated that the whole of the estate given to the son under the will would itself generate suspicious circumstance. It is difficult to accept the reasoning of the learned Judge. Admittedly, the will was executed and registered on 1-11-55 and she died 8 years thereafter in the year 1963. When the appellant had propounded the will in his written statement, nothing prevented either the respondent or any of the contesting defendants to file a rejoinder i.e. additional written statement with leave of the court under Order 8, Rule 9 pleading the invalidity of the will propounded by the appellant. Nothing has been stated in the pleadings. Even in the evidence when the appellant was examined as DW 1 and his attestation was as DW 2, nothing was stated with regard to the alleged pressure said to have been brought about by the appellant to

execute the will. In the cross-examination by the first respondent, no attempt was even made to doubt the correctness of the Will.

5. Under these circumstances, the suspicion which excited the mind of the District Munsif is without any basis and he picked them from his hat without fact-foundation. The Subordinate Judge had rightly considered all the circumstances and upheld the will. The High Court, without examining the evidence, by merely extracting legal position set out by various decisions of this Court has upset the finding of the fact recorded by the Subordinate Judge in one sentence. It is trite that it is the duty of the propounder of the will to prove the will and to remove all the suspected features. But there must be real, germane and valid suspicious features and not fantasy of the doubting mind."

(Underline supplied)

16. In the light of the aforesaid decisions, it can be safely said that once the burden to prove is discharged by the propounder in terms of Section 63 of the Succession Act and Section 68 of the

Evidence Act, and by adducing *prima facie* evidence proving the competence of the testator, the onus is on the contestant opposing to show *prima facie* the existence of suspicious circumstances so as to shift the onus on the propounder to dispel them. Without knowing the circumstances, which according to the contestant opposing are suspicious, how will the propounder be able to dispel them and to convince the court about its genuineness and validity. We are saying that the contestant opposing the Will has to raise surrounding suspicious circumstances specifically and not vaguely or in a general manner. A case of well-founded suspicion has to exist to cause shifting of onus back to the propounder once he discharged his burden to prove the execution of the Will. We may hasten to add that we shall not be understood to have held that failure of the party/parties to plead suspicious circumstances

would automatically make the court to take a Will as validly proved even where the circumstance(s) raising doubt is inherent in the document. Certainly, in such circumstances the propounder has to convince the court and dispel such suspicious circumstances.

17. Sequentially, it is only apropos to consider the tenability of the finding of the High Court that the plaintiff had failed to prove that the Will was executed by the testatrix with knowledge of the contents, and taking it as one of the suspicious circumstances. The unrefuted factual position obtained from the evidence on record is that the testatrix who died on 08.01.1993 at the age of 69 years, had studied up to S.S.L.C and was able to read and write English. She was a Municipal Councilor for 6 years, Trustee of Mangalore Port Trust, a Member of Cheshire Home, Mangalore and President of Christian Planters Guild,

Chickmagalur besides being an active Social Worker. We have already found that PW-3, one of the attesting witnesses to the Will in question was examined to satisfy the statutory mandate to prove execution. PW-3, would depose that the testatrix herself called him to attest the Will and that he had seen the testatrix reading the papers before putting the signatures. PW-2, who is one of the sons of testatrix also corroborated the version that PW-3 was called over phone by his mother to attest the Will and that she had also read the Will. Nothing to disbelieve their versions was elicited by the defendants during their cross-examinations. PW-3 deposed that it was in his presence that the testatrix had signed the Will. It cannot be said that a person afflicted with arthritis would not be in a position to read and understand the contents of a document. We have also adverted to the amendment sought to be brought in by

defendant No.5 by producing Ext.D5 and what turns out of it. When the above being the position, by no stretch of imagination it can be taken that the testatrix was illiterate or put her signature without understanding the contents of the Will. In the circumstances, the said suspicions excited the mind of defendant No.5 and accepted by the High Court cannot survive. In other words, they cannot be sustained.

18. Another circumstance treated as suspicious circumstance by the High Court is the prominent participation of the beneficiaries under the Will in the matter of its execution. The allegation of prominent participation as relates execution of a Will suggests some kind of influential interference on the testator/testatrix. There cannot be any doubt with respect to the position that the mere presence of executor or any beneficiary under a Will at the time of the execution of the Will *ipso*

facto will not invalidate it or is sufficient to cast suspicion on the execution of the Will. At any rate, it is for the person raising the same to prove that it was not a mere presence in the vicinity and it was capable of influencing the testator/testatrix. So also, the other reason assigned by the High Court that the advocate who drafted the Will was not examined, according to us cannot be said to be a legal requirement at all and at any rate, the non-examination of the advocate who drafted the Will cannot be a ground to discard the Will since it was proved by examining an attesting witness and no other circumstances surround it to make suspicious. We are fortified in our view by the decision of this Court in ***"Ramabai Padmakar Patil (D) Through Lrs. and Ors. Vs. Rukminibai Vishnu Vekhande and Ors***.[9]".

19. That apart (Ext.P3 and Ext.P4) documents

[9] (2003) 8 SCC 537

would undoubtedly show that the Will in question was acted upon by the parties. In that context, it is relevant to note that the oral testimony of DW-1 would reveal that during his examination he would admit the receipt of Rs.5,000/- under the Will. That apart his evidence would reveal that the firm was dissolved on 27.03.1987 and subsequently as per Exhibit P-8 (Memorandum of Understanding), the partnership was re-constituted. As per the division, the group to which DW-1 is a party got 62 acres of Coffee Estate known as Sheegekan Estate in Jaagra Village Chicmagalur District, a Tile Factory called Modern Tile Works in B.C. Road, Bantwal. He also deposed to the fact that under the Will executed by his father, he got 23 cents of land in Mangalore. Moreover, his evidence would reveal that the parties including himself who got such properties had subsequently sold them. This was relied on by the appellants to canvas the

position that they would go to show that there was nothing unnatural about the exclusion of some of the children while making the Will. In this context, it is to be noted that a Will is usually executed to alter the natural mode of Succession and hence, consequential result of reduction or deprival of the share of a natural heir. If the testator does not intend so there is no necessity at all for executing a Will.

20. In the said circumstances, we have no hesitation to hold that the trial Court had rightly considered all the circumstances to come to the conclusion that Ext.P2 Will was validly executed and it was proved by the appellants. The circumstances were taken as suspicious by the High Court sans foundation and the High Court erred in holding the subject Will dated 10.11.1992 as not proved. Hence, the judgment and order dated 21.11.2008 passed by the High Court of

Karnataka at Bangalore in M.F.A. No.3077 of 2001 is set aside and the judgment and decree dated 20.02.2001 passed by the III Additional District Judge, Dakshina Kannada at Mangalore, in O.S. No.21 of 1997 is restored and confirmed. The appeal is accordingly allowed. There shall be no order as to costs.

21. Pending application(s), if any, shall stand(s) disposed of.

.....J.
(C.T. RAVIKUMAR)

.....J.
(SANJAY KUMAR)

NEW DELHI;
DECEMBER 07, 2023.